



Texas Department of Transportation

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January 26, 2004

Mr. Horst Greczmiel
Associate Director for NEPA
Council on Environmental Quality
Executive Office of the President
722 Jackson Place, N.W.
Washington, DC 20503

Dear Mr. Greczmiel:

As you know, the Chair of the Council on Environmental Quality (CEQ) appointed a task force to review National Environmental Policy Act (NEPA) implementation practices and procedures "to determine opportunities to improve and modernize the NEPA process." The review began in April 2002. The task force completed its draft report in September 2003 after interviewing federal and state agencies, tribes, local governments, individuals, and organizations. The task force focused on:

- Technology and information management security
- Federal intergovernmental collaboration
- Programmatic analyses and tiering
- Adaptive management and monitoring
- Categorical exclusions
- Environmental assessment

The draft report provides a series of recommendations on each of the above issues. Attached, the Texas Department of Transportation (TxDOT) provides comments on each. We would also like to highlight one issue of special concern. Part of the biggest problem with NEPA implementation for the Departments of Transportation, one we cannot emphasize too strongly, is fragmentation and duplication of responsibility among the environmental resource agencies. For example, coordinated, parallel NEPA development and processing of the 404 wetlands permit for a major surface transportation project is supposed to be a streamlining step. In reality, the 404 permit becomes a second avenue for reviewing the NEPA decision process, and one subject to seemingly endless scrutiny from the varied elements within the resource agencies who, by law, USACE must consult in the process. Any positive changes the CEQ can bring about to break this "Gordian Knot" would be welcome.

I appreciate the opportunity to provide you with TxDOT's comments. If you have any questions, please contact Dianna F. Noble of my staff at (512) 416-2743.

Sincerely,

Steven E. Simmons, P.E.
Deputy Executive Director

Attachment

Modernizing NEPA Implementation

NEPA Task Force Report to the Council on Environmental Quality

Technology and Information Management Security:

Task Force Recommendations--need for high quality, relevant, and timely information to decision makers and the public; need for quality control of data and security of sensitive information; establishment of a NEPA technical working group to promote these needs among agencies.

Comment: We concur. High quality data from environmental studies or the technology to perform such studies has been generated by project sponsors and/or independent researchers. To ensure timely completion of the NEPA process, access to this data or technology is essential. In general, many states have taken a proactive approach to these issues and have processes in place that provide this access. Security has been built in to these processes and each focuses on high quality, relevant data.

That said, there do exist problems in this arena. As noted in the recommendations, the data must be relevant to the stage of development of the project. The resource agencies must not expect the level of data appropriate for final permitting of the project during a corridor study phase. There is also reluctance by some agencies to accept technology that is now widely used. For example, one agency has told us that they will not accept digital images, a technology that is widely accepted, for use in habitat assessment and wetland delineation. Thus, TxDOT recommends that the NEPA technical working group incorporate these concerns and seek ways to resolve these types of problems. Finally we ask that CEQ consider the resource needs (funding and staff) for developing this type of technology and seek ways to address these needs.

Federal intergovernmental collaboration:

Task Force Recommendations: need for improved collaboration among agencies, examining lessons learned, and developing training for the public to understand NEPA.

Comments: We concur. Interagency collaboration is a key to timely completion of the NEPA process, and should be strongly supported. The Texas Environmental Resource Stewards (TERS) initiative is a step forward to ensure this type of collaboration. However, as the task force points out, "collaboration is a deceptively simple concept" that is complicated by conflicting missions of different agencies. Programmatic Agreements, Memoranda of Understanding, and sharing of information between agencies can be used to help overcome conflicts. The recommendation to have CEQ-sponsored workshops and training on lessons learned, possibly delivered in-part over the internet, would be of great assistance to project sponsors. Because interagency collaboration continues to be an issue, TxDOT urges that the focus of the effort to provide relief under this recommendation be precisely on interagency collaboration and not on training the public in the NEPA process. In addition, TxDOT recommends that CEQ ensure that workshops and training clearly discuss roles and responsibilities for collaborating agencies.

Programmatic analyses and tiering:

Task Force Recommendations: convene a federal advisory committee or chartered work group to provide advice to CEQ and federal agencies on the different uses of programmatic analyses and tiered NEPA studies.

Comment: We concur. TxDOT is engaged in using tiered NEPA studies for the IH 69 and other projects. With new consideration of tolling to improve our ability to deliver transportation improvements, the ability to address the environmental issues on a program basis, such as bridge replacement program, addition of shoulders, trunk system improvements (i.e. two lane to four lane divided roadways) etc. and to enter in programmatic agreements would aid in streamlining the process.

In addition, looking at broad mitigation parameters at a regional or ecosystem level makes good sense. We need to be able to identify important eco-regions and, when possible, preserve portions of them as mitigation banks that will serve multiple purposes, i.e. wetland mitigation, habitat preservation, endangered species preservation, etc. TxDOT has encountered some reluctance on the part of regulatory agencies to take an inclusive, multiple purpose approach to the establishment and use of mitigation banks.

We have encountered problems with tiering, and the available guidance on both tiering and programmatic analyses is limited and needs to be expanded. It is unclear, for example, what level of detail is needed in Tier I of a corridor study and what issues are more appropriate for Tier 2. Problems with the tiering process are often closely related to the disparate missions of the individual federal resource agencies involved in the review and approval of NEPA documents and subsequent permitting and other approvals. Tier I and Tier 2 require differing levels of information and often regulatory agencies want to revisit Tier I decisions when additional levels of data are supplied in Tier 2.

Guidance is needed for decisions that occur outside of NEPA, such as regional planning and national corridor studies. These decisions often have to be revisited during the NEPA process which greatly hinders the streamlining initiative. Hence, TxDOT strongly supports this recommendation and believes that a chartered work group to identify best management practices for these decisions fit in with this recommendation for programmatic analyses and tiering.

Finally, we also point out that Programmatic Agreements, such as those commonly employed by the Advisory Council on Historic Preservation, can streamline and improve the overall approach to NEPA. Such agreements differ from programmatic analyses in that they are not to gather data but they do have similarities with the programmatic analyses discussed in the report that establish program goals or strategies. That is, Programmatic Agreements are developed with regulatory agencies to establish a process for environmental review of projects. That process would specify review time, mitigation when avoidance is not feasible, and other details about the coordination between the regulator and project sponsor. These details ensure that all parties have the same expectations of how the process will work, and it is this aspect of such agreements that allows them to aid the NEPA process. TxDOT recommends that the working group include programmatic agreements as they identify the best management practices.

Adaptive Management and Monitoring:

Task Force Recommendations: establish a working group to consider new guidance or revised regulations related to adaptive management (i.e., “post-decision responses to conditions, circumstances, or acquired information related to observed impacts” of a project).

Comment: Although adaptive management has been used to describe ecosystem management approaches for 30 years, its “monitor and adapt” model to manage impacts during the life of a project have rarely been used. On the other hand, if regulatory change requires that TxDOT and other transportation agencies re-visit mitigation decisions for all projects, it could be adverse to our mission and add little value to our environmental efforts and may actually create uncertainty as related to the NEPA process. In addition, many state DOTs (including TxDOT) are developing and implementing Environmental Management Systems (EMS); however not all are seeking ISO certification. Thus, it is strongly recommended that TxDOT and other state DOTs be part of the working group.

Categorical Exclusion:

Task Force Recommendations: promote consistent categorical exclusions (CEs) by issuing guidance on how to document environmental studies where few to no environmental impacts result in a CE decision, what a CE document should look like, and how they should be approved.

Comment: We concur. State DOTs follow the requirements of 23 CFR 771.117 for CEs. That section of federal regulations sets forth a number of classes of projects that meet CEQs regulations for CEs. However, as pointed out in your report, the FHWA regulations are among those federal agency regulations that need modernizing because they date to 1987. Some types of projects may need to be included as CEs but were not considered in 1987. If CEQ follows the recommendations of the task force without requiring that federal agencies update their own regulations, the efforts of the CEQ may be for naught. TxDOT believes that 23 CFR 771.117 and similar federal regulations should allow for regional offices of federal agencies to identify types of projects based on experience that, in that region, do not have significant environmental impacts, and to be given the authority to grant those projects CE status. Thus, while TxDOT strongly supports the recommendations of the task force, we believe that the recommendations should include an effort to assess the mechanism for allowing regional offices of federal agencies to identify types of projects based on experience that, in that region, do not have significant environmental impacts, and to be given the authority to provide for a rulemaking process to grant those projects CE status.

Environmental Assessments (EAs):

Task Force Recommendations: develop CEQ guidance to explain alternatives when mitigation measures must be considered, and appropriate public involvement; emphasize that EAs should focus on issues or resources that may be significantly affected.

Comment: There is a wide range in the amount of effort and costs expended for EAs. While it is necessary to perform some level of study of all possible environmental effects of a proposed project, TxDOT’s experience is that some of these are quickly studied and found not to be affected. In such cases, the documentation and mitigation efforts should be restricted to only those issues that are of concern. Too often, however, consultants study all environmental issues

to their fullest level, believing that is what the agency expects. Thus, TxDOT supports CEQ's guidance to ensure that there is wider consistency and a focus on the cogent issues.

Additional Areas of Consideration:

Task Force: Several topics raised during public comment were: need for trust and credibility of agencies implementing NEPA; adequate and professional staff to prepare quality environmental studies; workshops on judicial review of the Administrative Procedure Act; improvement on managing the NEPA process in an efficient and effective manner; better guidance on thresholds for supplemental environmental studies after initial environmental approval; delegation of NEPA authority; and, guidance on coordination of NEPA with other laws such as the Endangered Species Act.

Comment: TxDOT has concerns with some of these issues. Specifically, it is imperative to continue to be proactive and have professional technical staff to ensure that resource agencies and the public maintain their trust in our decisions. Adequate staffing at resource agencies has been a significant concern because absent adequate staff, project review is slowed. The report covers the problems raised by inadequate resourcing, both in FTEs and Information systems support. However, TxDOT underscores that the answer should not be to rely on the state DOTs to provide such positions, allowing the transfer of construction dollars to the resource agencies to create dedicated positions. Instead, encourage Congress to fund the agencies at an adequate level to ensure sufficient staff.

TxDOT also believe that collaboration training would greatly aid in coordinating NEPA with other laws: TxDOT staff attended the first class titled, *Improving Transportation and Environmental Reviews Through Collaborative Problem Solving*, offered in Texas in early October, and FHWA (Texas) is working on a session for those involved in I-69 in the spring. These training sessions early in the development of a big project will serve to set a pattern of cooperation and understanding. These types of courses should be funded by FHWA.

However, part of the biggest problem with NEPA for DOTs, and one that we cannot emphasize too strongly, is fragmentation and duplication of responsibility among resource agencies. This fragmentation and duplication adds greatly to the problem of coordination of NEPA with other laws and with conflicting agency missions. Under the current practice, projects often proceed under NEPA in a "best overall public interest mode" only to be delayed and damaged by the dictates of narrow permitting requirements that can trump the good work and decisions done earlier. CEQ should consider adding something about the relationship of NEPA to permitting and other approvals.